IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.A.ABDUL GAFOOR

WEDNESDAY, THE 14TH FEBRUARY 2007 / 25TH MAGHA 1928

SA.No. 563 of 1999(A)

{A.S.NO.122/1992 OF THE IST ADDL. DISTRICT COURT,
KOLLAM
IN O.S.NO.160/1991 OF THE MUNSIFF-MAGISTRATE COURT,
PARAVOOR}

.....

APPELLANTS/ADDL.RESPONDENTS 44 TO 49) LRS OF D2:
& **NOT PARTIES TO THE SUIT**

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1. BHAVANI, W/O.NEELAKANTAN,
MULAMOOTTIL VEEDU,
KONGAL CHERRY, PARAVOOR.

2. NEELAKANTAN KAMALA DEVI,
MULAMOOTTIL VEEDU,
KONGAL CHERRY, PARAVOOR.

3. NEELAKANTAN KUMARAN,
MULAMOOTTIL VEEDU,
KONGAL CHERRY, PARAVOOR.

4. NEELAKANTAN SAROJAM,
MULAMOOTTIL VEEDU,
KONGAL CHERRY, PARAVOOR.

5. NEELAKANTAN GOPI,
MULAMOOTTIL VEEDU,
KONGAL CHERRY, PARAVOOR.

6. NEELAKANTAN PRASANNA,
MULAMOOTTIL VEEDU,
KONGAL CHERRY, PARAVOOR.

BY ADV. SRI.SEBASTIAN DAVIS

RESPONDENTS/APPELLANTS & RESPONDENTS 1 & 3 TO 44/
PLAINTIFFS & DEFENDANTS 1 AND 3 TO 40:

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1. NARAYANAN RAVEENDRAN, RAMARAJ COTTAGE,* **[DIED]**
KOTTAPURAM VILLAGE, PARAVUR.

2. NARAYANAN SADANANADAN, VILAYIL VEEDU,
KOTTAPURAM VILLAGE, PARAVUR.

3. NARAYANAN SOMARAJAN, VILAYIL VEEDU,* **[DIED]**
KOTTAPURAM VILLAGE, PARAVUR.

85. A.D.SEEMA, D/O.DEVADATHAN,
DARSANAM, PLAN DROOM COMPOUND,
BRIGADIAR LINE, VIKAS BHAVAN,
THIRUVANANTHAPURAM.

86. SIBI, S/O.DEVADATHAN,
DARSANAM, PLAN DROOR COMPOUND,
BRIGADIAR LINE, VIKAS BHAVAN,
THIRUVANANTHAPURAM.

LRS OF R3, 5 AND 31 RECORDED:

IT IS RECORDED THAT R35 AND 36 ARE THE LEGAL REPRESENTATIVES OF DECEASED 3RD RESPONDENT AND R10 TO 17 ARE THE LEGAL REPRESENTATIVES OF DECEASED R5 AND R38 AND 40 TO 42 ARE THE LEGAL REPRESENTATIVES OF DECEASED 31ST RESPONDENT AS PER ORDER DT. 6.8.02 IN CMP 1452/02.

THE NAME OF 37TH RESPONDENT IS DELETED FROM PARTY ARRAY AT THE RISK OF THE APPELLANTS AS PER ORDER DATED 7.7.03 IN I.A.280/03.

ADDITIONAL R87 TO 89 IMPLEADED:

ADDL. R87. SUDHA, W/O.LATE C.G.SUNDARESAN,
SREEKOVIL, KOTTAPURAM, PARAVOOR, P.O.KOLLAM.

R88: SREEJESH, S/O.LATE C.G.SUNDARESAN,
DO. DO.

R89. SREEDRISYA, D/O.LATE SUNDARESAN,
DO. DO.

ADDITIONAL RESPONDENTS 87 TO 89 ARE IMPLEADED AS THE LEGAL HEIRS OF THE DECEASED 39TH RESPONDENT AS PER ORDER DT. 5.8.03 VIDE CMP 1449/02.

IT IS RECORDED THAT THE 47TH RESPONDENT IS DEAD AND RESPONDENTS 49 TO 52 ARE THE LEGAL HEIRS OF THE DECEASED 47TH RESPONDENT AS PER ORDER DATED 13.1.04 VIDE MEMO CF 108/04 DT. 8.1.04.

ADDL.R90: N.RAMADEVI, RAMARAJ COTTAGE,
KOTTAPURAM, PARAVOOR.

R91: R.KRISHNARAJ, RAMARAJ COTTAGE,
KOTTAPURAM, PARAVOOR.

R92: R.JAYARAJ, RAMARAJ COTTAGE,
KOTTAPURAM, PARAVOOR.

ADDITIONAL RESPONDENTS 90 TO 92 ARE IMPLEADED AS THE LEGAL HEIRS OF THE DECEASED FIRST RESPONDENT AS PER ORDER DATED 28.1.04 IN IA 125/2004.

R1, 2, 4, 6 TO 30, 32, TO 36, 38, 40 TO 44 & 90 TO 92
BY ADV. SRI.B.SURESH KUMAR

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 14/02/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON C.M.P.NOS.1554/00 & 538/02
IN S.A.NO.563/99

DISMISSED.

Sd/-
(K.A.ABDUL GAFOOR)
14.02.2007. JUDGE

sk/-

//true copy//

P.S. To Judge.

K.A.ABDUL GAFOOR J.

S.A.No.563 of 1999 A

Dated this the 14th day of February, 2007.

JUDGMENT

Abdul Gafoor, J.

The legal representatives of the 2nd defendant are the appellants in this case.

2. The 2nd defendant, along with others resisted the partition suit. The resistance was successful at the trial stage. But in appeal by the plaintiffs, it was reversed and the partition suit was decreed, after considering in detail and finding that Ext.A1 under which the plaintiffs claim partition was a partition deed effected between the daughters of Kurumba, the common ancestor of the parties.

3. According to the appellants, Ext.A1 is not a partition deed, but only a family arrangement for enjoyment of the properties. It has been so decided in a suit between the parties to the present suit or their

ancestors which led to Ext.B1 judgment and Ext.B1 has been confirmed in Ext.A5 appellate judgment. Therefore, the point whether Ext.A1 was a partition deed could not have been further enquired into, as done by the lower appellate court. Therefore, this appeal at the instance of the legal representatives of the 2nd defendant raising a question of law, in the light of the conclusive finding in Ext.B1 confirmed by Ext.A5, whether the lower appellate court was justified in considering as to whether Ext.A1 was a partition deed or not.

4. Ext.A1 is a document executed in the year 1093 ME by Kochappi and Kochuchakki and their children, who belong to the thavazhi of one Kurumba, who had executed a document in the year 1085 ME along with her sister Kunjuchakki in respect of the property held by their mother Kurumba. Kochappi had

other children including Nani, the mother of the plaintiffs and Neelakantan - 2nd defendant, the father of the appellants. There was an earlier suit O.S.No.44/59 on the file of the Munsiff's Court, Paravoor which led to Ext.B1 judgment dated 8.4.1960. Some of the plaintiffs therein viz., plaintiffs 9, 10 and 11 are defendants 7, 8 and 9 respectively in the present suit. Defendants 6, 7, 8, 5, 9, 10, 11, 13 are plaintiffs 1, 2, 3, 5, 6, 7, 9 and 10 respectively. Plaintiffs 4 and 8 are the legal representatives of the 4th defendant in Ext.B1. The others are also persons claiming under the parties to the said suits or members of the same tharwad.

4. The present Ext.A1 is introduced in evidence by the plaintiffs as a partition deed under which the plaintiffs are claiming shares in the scheduled property. The trial court found that it was not a partition deed, but only an arrangement for enjoyment

of the properties by the executant of the said documents. But in appeal, the lower appellate court proceeded to examine the contentions of the defendants in para 11 in the following lines:

> **"According to the contesting defendants D1 and D2, (D1 had died subsequently) the parties belonged to Thavazhi of Kochappi. But the properties are not the sub tarwad properties and Ext.A1 was not a partition and as such othe members of the tarwad are necessary parties. The partition arrangement entered into by the parties under the branch of Kochuchakki (A2) was not acceptable and the decree in O.S.44/59 was decided against them and as such the present claim of the plaintiffs/appellants also cannot sustain".**

5. Then the court proceeded, in the light of the rival contentions, to consider, as mentioned in para 12 of the appellate court judgment,:

> **"Whether *Ext*.A1 is only a family arrangement for enjoyment of the properties or an outright partition".**

6. It is based on this consideration, the lower appellate court came to the conclusion in paragraph 25 as follows:

> **"There was O.S.44/1959 filed by Kochukunjali the sister of Nani, the mother of the 1st plaintiff and her children against the present defendants on the strength of Ext.A1. In that case document no.1085 and the document No.1093 (present *Ext*.A1) were produced. The court had found that all the members of the family of Poova are necessary parties and accordingly vide *Ext*.A3 the suit was dismissed. A.S.209/60 was filed against the decree. *Ext*.A4 is the decree in A.S209/60. The appeal was allowed in part and the partition over B schedule item was allowed in favor of the plaintiffs. *Ext*.A5 is the copy of the judgment in A.S.209/60. The appeal was allowed in part and the partition over B**

> **schedule item was allowed in favor of the plaintiffs. *Ext*.A5 is the copy of the judgment in A.S.209/60. The court had found by the recitals in the document indicated that it was only an arrangement for enjoyment of the property. Evidently this finding vide *Ext*.A5 cannot operate as res judicata or estoppel by record. *Ext*.A5 as such does not come within the purview of Section 11 C.P.C. The operation of the Hindu Succession Act and the Joint Hindu Family System, (Abolition act 1976) are also to be considered in the case."**

7. It is this approach and finding of the lower appellate court, in re-examining whether Ext.A1 was outright partition, which is strongly assailed in this appeal, raising the question of law as mentioned above, relying on Ext.B1 judgment between the parties that Ext.A1 never amounts to an outright partition, but only an arrangement for enjoyment of the properties.

8. As already found above, Ext.B1 is between the parties or their ancestors. Ext.A1 is Ext.A in Ext.B1. That Ext.A was a document subsequent to Ext.1 referred to in Ext.B1. Ext.1 is a family arrangement entered into between Kurumba and Kunjuchakki, who were common ancestors. Kurumba had two daughters Kochappi and Kochuchakki. Their thawazhi entered into a document Ext.A1 in the present case which is claimed as a partition deed. Examining these two documents in the suit between the parties, as already mentioned above, it was found in Ext.B1 as follows:

> **"From a consideration of the entire document, the intention of the parties is unambiguously clear, and that intention is not one of an out right partition, but only to have an arrangement for a better and convenient enjoyment of the properties till some other arrangement is made. The absence of a clause for the continuance of a common karnavan, or the provision for**

> **the payment of tax separately and for separate residence cannot make the udampady a partition. There is nothing to show that absolute rights were conferred on the 2 groups and therefore the contention of the plaintiffs that the restraint on alienation imposed on the 2 groups under the document has to be ignored, has no force. It is admitted that the different sharers have not jointly modified this document."**

9. This was a finding concerning Ext.1 referred to in Ext.B1. Ext.A1 was further considered and came to the following finding:

> **"Further they have not got absolute rights over some of the properties included in *Ext*.A, namely those which were allotted to them under *Ext*.I, which is only a maintenance arrangement and not a partition, and as such the members are also incompetent to divide them absolutely."**

10. Thus, there is conclusive finding with respect to Ext.A1 in the present case, in a former suit between the parties or between those under whom the parties claim that Ext.A1 was not an out right partition, but only an arrangement for enjoyment alone.

11. Going by section 11 of the Code of Civil Procedure, "no court shall try any suit or issue in which the matter directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim". The issue which was directly and substantially in issue in Ext.B1 suit was whether Ext.A therein, which is the same as Ext.A1 in the present suit, was a partition deed or not. It has been conclusively found in Ext.B1 that it was not a partition deed. That has been confirmed in Ext.A5. Necessarily, the lower appellate court ought not to have reconsidered that issue which had been concluded

between the parties to arrive at a different finding that it was a partition deed. It is opposed to Section 11 of the Code of Civil Procedure. Therefore, the said finding has to be reversed on the ground that Ext.B1 acts as res judiciata as per Section 11 of the Code of Civil Procedure, answering the question of law raised in this appeal in favour of the appellants.

Accordingly, the appeal is allowed, the judgment and decree of the lower appellate court is set aside and the judgment and decree of the trial court is restored. Anyhow, there will be no order as to costs.

Sd/-
(K.A.ABDUL GAFOOR)
JUDGE

sk/

//true copy//

K.A.ABDUL GAFOOR, J.

S.A.No.563 of 1999 A

JUDGMENT

14th February, 2007.